STATE OF MICHIGAN

IN THE SUPREME COURT

JOANNE ROWLAND a/k/a
JOAN ROWLAND,

Plaintiff-Appellee,

-vs-

WASHTENAW COUNTY
ROAD COMMISSION,

Defendant-Appellant,
_____/

Supreme Court No. 130379

Court of Appeals No. 253210

Washtenaw County Circuit Court
No. 03-000128-NO

AMICUS CURIAE BRIEF OF THE MICHIGAN MUNICIPAL LEAGUE, THE MICHIGAN MUNICIPAL LEAGUE LIABILITY & PROPERTY POOL, AND THE MICHIGAN TOWNSHIPS ASSOCIATION

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TABLE OF CONTENTS

INDEX TO AUTHORITIES

Page

MICHIGAN CASES

FEDERAL CASES

OUT-OF-STATE CASES

COURT RULES

STATUTES

CONSTITUTIONAL AUTHORITIES

LEGAL TREATISES & TEXTS

LAW REVIEW MATERIALS

OTHER AUTHORITIES

MISCELLANEOUS

STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

This Court has jurisdiction because it granted leave to appeal from a timely application filed on behalf of the Washtenaw County Road Commission pursuant to MCR 7.301 and MCR 7.302.

STATEMENT OF THE QUESTIONS INVOLVED

I.

IS THE OVERRULING OF *HOBBS v MICHIGAN STATE HIGHWAY DEP'T*, 398 MICH 90, 96 (1976), AND *BROWN v MANISTEE CO ROAD COMM*, 452 MICH 354, 356-357 (1996), JUSTIFIED UNDER THE STANDARD FOR APPLYING STARE DECISIS DISCUSSED IN *ROBINSON v CITY OF DETROIT*, 462 MICH 439, 463-468 (2000)?

Joanne Rowland a/k/a Joan Rowland answers "No."

Washtenaw County Road Commission answers "Yes."

The Washtenaw County Circuit Court answered "No."

The Court of Appeals answered "No."

Amicus Curiae the Michigan Municipal League, the Michigan Municipal League Liability & Property Pool, and the Michigan Townships Association answer "Yes."

II.

SHOULD A DECISION OVERRULING *HOBBS* AND *BROWN* HAVE RETROACTIVE OR PROSPECTIVE APPLICATION UNDER THE STANDARD DISCUSSED IN *POHUTSKI v CITY OF ALLEN PARK*, 465 MICH 675, 695-699 (2002)?

Joanne Rowland a/k/a Joan Rowland answers "No."

Washtenaw County Road Commission answers "Yes."

The Washtenaw County Circuit Court answered "No."

The Court of Appeals answered "No."

Amicus Curiae the Michigan Municipal League, the Michigan Municipal League Liability & Property Pool, and the Michigan Townships Association answer "Yes."

STATEMENT OF FACTS

Amicus Curiae the Michigan Municipal League, the Michigan Municipal League Liability and Property Pool, and the Michigan Townships Association adopt the statement of facts and proceedings set forth in the brief on appeal of the defendant-appellant Washtenaw County Road Commission's brief.

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews de novo questions of law. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). A trial court's interpretation of a statute is a question of law subject to de novo review. *Stanton v Battle Creek*, 466 Mich 611; 647 NW2d 508 (2002). A trial court's ruling on a motion for summary disposition is also reviewed de novo, *Maskery v Board of Regents of the University of Michigan*, 468 Mich 609; 664 NW2d 165, 167 (2003); *Hinkle v Wayne Co Clerk*, 467 Mich 337, 340; 654 NW2d 315 (2002); and *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (2000). In engaging in such review, the appellate court must study the record to determine if the movant was entitled to judgment as a matter of law, *Groncki v Detroit Edison Co*, 453 Mich 644, 649; 557 NW2d 289 (1996) and *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992). Stated otherwise, giving the benefit of doubt to the non-movant, an appellate court is charged with independently determining whether the movant would have been entitled to judgment as a matter of law.

In the court below, the Washtenaw County Road Commission sought summary disposition on the basis of MCL 691.1404 because Rowland failed to give notice as required under the statute. This question is subject to de novo review.

ARGUMENT I

OVERRULING *HOBBS v MICHIGAN STATE HIGHWAY DEP'T*, 398 MICH 90, 96 (1976), AND *BROWN v MANISTEE CO ROAD COMM*, 452 MICH 354, 356-357 (1996), IS JUSTIFIED UNDER THE STANDARD FOR APPLYING STARE DECISIS DISCUSSED IN *ROBINSON v CITY OF DETROIT*, 462 MICH 439, 463-468 (2000).

A. *HOBBS* AND *BROWN* WERE BASED UPON AN ERRONEOUS VIEW OF THE CONSTITUTIONALITY OF NOTICE PROVISIONS AND ALTERED A LEGISLATIVE DETERMINATION REGARDING THE CONDITIONS UNDER WHICH AN INJURED PERSON MAY RECOVER FROM A GOVERNMENTAL AGENCY FOR A DEFECTIVE HIGHWAY CLAIM.

1. THE LEGISLATURE IS EMPOWERED TO MAKE POLICY DECISIONS INCLUDING THOSE EMBODIED IN THE NOTICE REQUIREMENTS UNDER MCL 691.1404 AND SIMILAR STATUTES.

Separation of powers principles require the judiciary to respect legislative policy choices such as those embodied in MCL 691.1404 unless they violate other constitutional strictures. See Const 1963, art 3, § 2 and art 6, § 1. As long as the legislative policy choices embodied in MCL 691.1404 pass constitutional muster under the highly-deferential rational basis test, the Court should decline the invitation (accepted in *Hobbs* and *Brown*) to rewrite the plain language of the statute and substitute its own policy choices for those made by the Legislature. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 405; 605 NW2d 300 (2000). This deference to legislative policy-making stems from the Court's understanding of its constitutional role and its recognition that the legislature is better-situated to assess the trade-offs associated with a particular policy choice than is the judiciary. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005). This Court has not hesitated to overrule lower court decisions that are an affront to the constitutionally-derived separation of powers because they ignore or override a legislative policy choice by failing to give effect to language in a statute. *Casco Twp v Secretary of State*, 472 Mich 566; 701 NW2d 102 (2005).

MCL 691.1404 is part of the Governmental Tort Liability Act, MCL 691.1401 *et seq.*, an act to provide immunity for governmental agencies and to establish various exceptions to that immunity. When it was enacted, the Legislature altered common law rules regarding suit against governmental agencies and their employees. Our Constitution gives the Legislature this power to abolish or modify common-law and statutory rights and remedies. *Donajkowski v Alpena Power Co*, 460 Mich 243, 256 n 14; 596 NW2d 574 (1999). Article 3, § 7 of the Michigan Constitution, specifically empowers the Legislature to override or alter the common law:

> The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.

Where the Legislature can completely eliminate a cause of action, it logically follows that the Legislature can also take the less drastic step of limiting the damages recoverable for a particular cause of action. See *Kirkland v Blaine Co Medical Center*, 134 Idaho 464, 468; 4 P3d 1115 (2000); *Murphy v Edmonds*, 325 Md 342, 373; 601 A2d 102 (1992). Michigan courts have recognized these principles in the context of governmental immunity. *Pittman v City of Taylor*, 398 Mich 41; 247 NW2d 512 (1976) (common-law sovereign immunity abrogated by statute). The Legislature is empowered to define the parameters of suits against sub-sovereign entities as part of its ability to regulate in the area of the common law. Thus, analysis begins with the proposition that, in enacting MCL 691.1404, the Legislature exercised its powers to make policy choices concerning the common law and decided to condition suits based on defective highways on compliance with a notice requirement.

2. *HOBBS* AND *BROWN* ERRONEOUSLY ENGRAFTED AN ACTUAL PREJUDICE REQUIREMENT ONTO MCL 691.1404 TO AVOID RENDERING THE STATUTE UNCONSTITUTIONAL WHEN THE STATUTE AS WRITTEN PRESENTED NO CONSTITUTIONAL IMPEDIMENT.

a. MCL 691.1404 Contains No Actual Prejudice Requirement.

MCL 691.1404 requires an injured party to give notice to the government and specifies the information to be included in that notice and its manner of delivery:

> (1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.
>
> (2) The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding. In case of the state, such notice shall be filed in triplicate with the clerk of the court of claims. Filing of such notice shall constitute compliance with section 6431 of Act No. 236 of the Public Acts of 1961, being section 600.6431 of the Compiled Laws of 1948, requiring the filing of notice of intention to file a claim against the state. If required by the legislative body or chief administrative officer of the responsible governmental agency, the claimant shall appear to testify, if he is physically able to do so, and shall produce his witnesses before the legislative body, a committee thereof, or the chief administrative officer, or his deputy, or a legal officer of the governmental agency as directed by the legislative body or chief administrative officer of the responsible governmental agency, for examination under oath as to the claim, the amount thereof, and the extent of the injury.
>
> (3) If the injured person is under the age of 18 years at the time the injury occurred, he shall serve the notice required by subsection (1) not more than 180 days from the time the injury occurred, which notice may be filed by a parent, attorney, next friend or legally appointed guardian. If the injured person is physically or mentally incapable of giving notice, he shall serve the notice required by subsection (1) not more than 180 days after the termination of the disability. In all civil actions in which the physical or mental capability of the person is in dispute, that issue shall be determined by the trier of the facts. The provisions of this subsection shall apply to all charter provisions, statutes and ordinances which require written notices to counties or municipal corporations.

MCL 691.1404. The Legislature conditioned recovery for an injury caused by a defective highway on compliance with this notice requirement. *Id.* The Legislature required the "injured

person" to give notice to the governmental agency of the "occurrence of the incident and the defect." MCL 691.1404(1). The notice must include "the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant." *Id.*

These provisions reflect policy choices of the Legislature with respect to the conditions under which immunity is lifted, and a governmental agency may be held liable for a defective highway. Longstanding precepts of statutory interpretation require the court to give effect to the language when it is unambiguous. *Reed v Yackell*, 473 Mich 520; 703 NW2d 1 (2005). In interpreting statutory language, courts must determine and give effect to the intent of the Legislature. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). The first step in ascertaining legislative intent is to look at the words of the statute itself. *House Speaker v State Admin Bd*, 441 Mich 547; 495 NW2d 539 (1993).

Under these principles of statutory interpretation, MCL 691.1404 cannot be reconciled with the reading given to it in *Hobbs* and *Brown*. No language in MCL 691.1404 requires the governmental agency to show that the failure to comply with the notice requirement caused actual prejudice to the governmental agency. No language in MCL 691.1404 provides any exception for compliance with the notice requirements. To the contrary, the provisions regarding notice are written as bright-line rules with specific, enforceable, and clear requirements regarding the notice.

b. Contrary To *Hobbs* And *Brown*, MCL 691.1404 Passes Constitutional Muster As Written.

Hobbs and *Brown* departed from these principles of statutory interpretation. *Hobbs* and *Brown* engrafted an additional actual-prejudice requirement onto the notice provisions in order to avoid rendering the statute unconstitutional. But *Hobbs* and *Brown* were badly reasoned. The

notice requirement in MCL 691.1404 passes constitutional muster as enacted; no judicial gloss or limiting construction is needed to save the statute.

Michigan courts ordinarily recognize an obligation to defer to legislative policies choices. See e.g., *Frame v Nehls*, 452 Mich 171; 550 NW2d 739 (1996) (legislative line-drawing relating to grandparent visitation upheld because legislation passed rational-basis scrutiny and wisdom of line-drawing was up to legislature to determine). Under rational-basis review, courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose. *Dandridge v Williams*, 397 US 471, 485; 90 S Ct 1153; 25 L Ed 2d 491 (1970). To prevail under this highly deferential standard of review, a challenger must show that the legislation is "arbitrary and wholly unrelated in a rational way to the objective of the statute." *Smith v Employment Security Comm*, 410 Mich 231, 271; 301 NW2d 285 (1981). A classification reviewed on this basis passes constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable. *Shavers v Attorney General*, 402 Mich 554, 613-614; 267 NW2d 72 (1978).

Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with "mathematical nicety," or even whether it results in some inequity when put into practice. *O'Donnell v State Farm Mutual Automobile Ins Co*, 404 Mich 524, 542; 273 NW2d 829 (1979). Rather, the statute is presumed constitutional, and the party challenging it bears a heavy burden of rebutting that presumption. *Shavers*, *supra*. *Crego v Coleman*, 463 Mich 248, 259-260; 615 NW2d 218 (2000) and *Harvey v State Dep't of Management & Budget*, 469 Mich 1, 7-8; 664 NW2d 767 (2003). Indeed, "[f]ew statutes have been found so wanting in 'rationality' as to fail to satisfy the 'essentially arbitrary' test." *Manistee Bank & Trust v McGowan*, 394 Mich 655, 668; 232 NW2d 636 (1975). Presumably, this is so because the rational basis test reflects the judiciary's awareness that "'it is up to

legislatures, not courts, to decide on the wisdom and utility of legislation.'" *American States Ins Co v State Dep't of Treasury*, 220 Mich App 586, 597; 560 NW2d 644 (1996), quoting *Gronne v Abrams*, 793 F2d 74, 77 (CA 2, 1986).

Notice requirements such as those included in MCL 691.1404 are a common legislative response to the lifting of immunity in various contexts. See Daniel E. Feld, J.D., *Modern status of the law as to validity of statutes or ordinances requiring notice of tort claim against local governmental entity*, 59 ALR 3d 93. Their purpose is to enable local governmental authorities to conduct a prompt investigation of the injury in question while the matter is fresh and the witnesses are available. This discourages litigation by giving governmental officials an opportunity to determine intelligently whether there is liability, and if so, to make prompt settlement and to avoid the costs of suit. In other words, the notice requirements permit prompt investigation of claims while the evidence is fresh and allow for the quick evaluation and settlement of meritorious claims. They also facilitate the speedy repair of dangerous or defective conditions, and help a governmental agency to budget for claims. Courts have almost uniformly held them to be valid. Feld, § 2a.

The notice requirement is rationally related to a legislative goal of ensuring that the governmental agency can quickly investigate the occurrence, settle meritorious claims early, and correct dangerous or defective conditions before injury occurs to someone else. The notice requirement also assists the governmental agency in its accounting and budgeting process by allowing it to estimate potential liability and plan for any related potential expenditures. These requirements satisfy the minimal scrutiny afforded for legislation challenged under the rational basis test.

Justice Riley explained that "[n]otice provisions rationally and reasonably provide the state with the opportunity to investigate and evaluate a claim." *Brown v Manistee Co Road*

Comm, 452 Mich 354, 369; 550 NW2d 215 (1996). In her view, the "mere fact that in some cases the legislation prevents prejudice to the government by itself is a rational basis." *Id.* She also pointed out that "if the Legislature may provide no recovery at all, it may place a condition on recovery, i.e., a reasonable notice provision." 452 Mich at 371 citing Justice Coleman's dissent in *Hobbs*. This proposition has been recognized by this Court for almost one hundred years. *Moulter v City of Grand Rapids*, 155 Mich 165; 118 NW 919 (1908) (since the right to recover for injuries arising from defective sidewalks is purely statutory, the legislature may attach any conditions to that right that it chooses). In 1970, in an opinion signed by only three justices,[1] this Court overruled *Moulter* on the basis that the "litigant who fails to submit the require notice of claim is stripped of all real remedy." *Grubaugh v City of St. Johns*, 384 Mich 165; 180 NW2d 778 (1970). *Grubaugh*'s error set the stage for the Court's later cases, which failed to acknowledge the legislative power to set conditions on or entirely abolish governmental tort liability. These decisions departed from a proper understanding of this Court's role in interpreting and applying legislation. They cannot be reconciled with this Court's constitutional jurisprudence. Justice Frankfurter called stare decisis a "principle of policy and not a mechanical formula of adherence to the latest decision, however recent or questionable, when such adherence involves collision with a prior doctrine more embraceable in its scope, intrinsically sounder, and verified by experience." *Helvering v Hallock*, 309 US 106, 119; 60 S Ct 444; 84 L Ed 2d 604 (1940). *Hobbs, Brown*, and *Grubaugh* collide with the well-established and sound constitutional doctrine deferring to rational legislative policy choices made to further legitimate government goals.

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[1]Two justices concurred in the result only. One justice dissented. And one justice did not participate. Thus, although the plurality opinion in *Grubaugh* commanded only three of seven justice's support, it purported to overrule *Moulton*, struck down a 60-day notice provision, and held that the minor plaintiff who was rendered physically and mentally handicapped as a result of the accident and who did not nominate a guardian until after the time had elapsed, could proceed with suit. 384 Mich 165, 175-177; 180 NW2d 778 (1970).

MCL 691.1404 also survives any challenge based on equal protection. Section 1404's differentiation between victims of government negligence and victims of private negligence is not unconstitutional. The majority in *Reich v State Highway Dep't*, 386 Mich 617; 194 NW2d 700 (1972) went astray by reasoning that the Governmental Tort Liability Act was intended to put government tortfeasors on an equal footing with private tortfeasors. Justice Brennan's dissent in *Reich* correctly identified this error; the *Reich* majority's premise, that the legislature sought to treat governmental tortfeasors uniformly with private tortfeasors, cannot be squared with the statute. When it enacted MCL 691.1401 *et seq*. the Legislature sought to define and limit the liability of governmental units and to make the liability of various governmental units uniform—a status local government had lost with the abrogation of common law municipal immunity in *Williams v Detroit*, 364 Mich 231; 111 NW2d 1 (1961). In *Mack v Detroit*, 467 Mich 186; 649 NW2d 47 (2002), this Court explained this history:

> In response to *Williams* and the possibility that this Court would further erode the remaining common-law governmental immunity for counties, townships, and villages, the Legislature enacted the Governmental Immunity Act of 1964(GIA), thereby reinstituting governmental immunity protection for municipalities and preserving sovereign immunity for the state. In effect, the GIA restored the *Williams* status quo ante. *Pohutski*, *supra* at 682, 641 NW2d 219. Thus, contrary to *McCummings*, it did not take a legislative decree to create governmental immunity, but a legislative act to preserve the doctrine that this Court had historically recognized as a characteristic of government.

467 Mich at 202. *Reich* wrongly concluded that requiring notice to a governmental agency but not a private tortfeasor constituted an arbitrary and unreasonable variation in both portions of a natural class and thus violated equal protection guarantees. But this would only be true if the two groups were part of the same class.

Governmental and private tortfeasors are not part of the same class. The overarching difference is that local governments draw power from the state, which must consent to be sued. This aspect of government agencies makes them fundamentally different from private actors.

Because the state can delegate its powers to local governments, it can allow or refuse to allow suit against them. Thus, the statute did not arbitrarily deviate between persons or entities in the same class; it properly distinguished between governmental and non-governmental entities.

Reich announced that "actual prejudice" to the state was "the only legitimate purpose we can posit for this notice provision." To reach this conclusion, *Reich* unduly narrowed the statutory purpose that it attributed to the legislature when analyzing the constitutionality of MCL 691.1404. Having done so, the Court then concluded that the notice requirement would be constitutional but only if the governmental agency shows actual prejudice. See also *Carver v McKernan*, 390 Mich 96, 99-100; 211 NW2d 24 (1973) (rejecting argument that notice requirement unconstitutional because it may be intended to assist in allowing the government to investigate the claim, determine possible liability of the motor vehicle accident fund, and create reserves and anticipate future demands on the fund but engrafting showing-of-prejudice requirement onto statute). This was error.

The purpose of the statute was broader. In addition to helping the government preserve evidence of a highway's condition, the statute was intended to allow the government to correct highway defects to avoid further injury, to facilitate speedy resolution of claims in appropriate cases, and to forecast the government's need for reserves to pay potential claims. None of these purposes depend upon a showing of actual prejudice. Thus, the statute survives constitutional scrutiny even in the absence of the *Reich* actual-prejudice limitation. Moreover, as Justice Riley pointed out in dissent, even if the sole purpose were to avoid prejudice, an over-inclusive statute passes constitutional muster under a rational basis test. *Brown*, 452 Mich at 369.

Despite the overwhelming acceptance of notice requirements in other jurisdictions, this Court erroneously engrafted an actual prejudice requirement onto MCL 691.1404 in *Hobbs* and *Brown*, to avoid rendering the statute unconstitutional as written. The *Hobbs* and *Brown*

majorities accepted an analysis that is inconsistent with Michigan constitutional law, cannot be reconciled with this Court's treatment of legislative powers in the area of governmental immunity and highway defect claims, has not been followed by courts in other jurisdictions, and requires enforcement of an "actual prejudice" requirement that is completely absent from the statutory text.

In *Lesner v Liquid Disposal, Inc*, 466 Mich 95; 643 NW2d 553 (2002), the Court explained that its "duty is to apply the language of the statute as enacted, without addition, subtraction, or modification." 466 Mich at 101. This Court emphasized its obligation to enforce the statutory text as written by stating:

> We may not read anything into the unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.... In other words, the role of the judiciary is not to engage in legislation.

Id. citing *Omni Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999) and *Tyler v Livonia Public Schools*, 459 Mich 382, 392-393, n 10; 590 NW2d 560 (1999). *Hobbs* and *Brown* cannot be reconciled with prevailing Michigan law and should therefore be overruled.

c. Overruling *Hobbs* And *Brown* Is Justified Under The Standard For Applying Stare Decisis Discussed In *Robinson*.

This Court has recognized that it is duty-bound to re-examine a precedent where its reasoning is fairly called into question. *Robinson*, 462 Mich at 464. It must do so by first examining whether the earlier decision was wrongly decided. 462 Mich at 462. If so, it then evaluates whether it is appropriate to overrule the decision by examining "the effects of overruling it, including most importantly the effect on reliance interests and whether that overruling would work an undue hardship because of that reliance." 462 Mich at 466. An important factor in this evaluation is whether the past decision "would perpetuate an unacceptable abuse of judicial power." 462 Mich at 473. When a past decision has "usurp[ed] power properly belonging to the legislative branch," overruling it "does not threaten

legitimacy.... [I]t restores legitimacy." 462 Mich at 473. When, "under the guise of statutory construction, this Court ignores the language of the statute to further its own policy views, it wrongly usurps the power of the Legislature." 462 Mich at 474. In those circumstances a reversal is warranted in order to "restore judicial legitimacy by overruling decisions that wrongly usurped the power of the Legislature." 462 Mich at 474.

In *Planned Parenthood v Casey*, 505 US 833; 112 S Ct 2791; 120 L Ed 2d 674 (1992), the United States Supreme Court examined a series of policy factors that comprise the doctrine of stare decisis. Those included the questions of "(1) the "workability" of a prior case or line of cases; (2) the protection of reasonable reliance interests; (3) the erosion of the doctrine's foundations by subsequent decisions; (4) changed factual circumstances; and (5) the need to preserve public impressions of judicial integrity...." Michael Stokes Paulsen, *Abrogating stare decisis by statute: may congress remove the presidential effect of Roe and Casey*?, 109 Yale L J 1535, 1551 (2000). This Court has embraced a similar analysis when evaluating past precedent. *Robinson*, 462 Mich 439, 464 citing *Casey* with approval. See also *People v Kazmierczak*, 461 Mich 411, 424-425; 605 NW2d 667 (2000) and *Nawrocki v Macomb Co Road Comm*, 463 Mich 143; 615 NW2d 702 (2000). When a decision is unworkable, or is badly reasoned, or changes in the law and facts warrant it, stare decisis does not compel adherence to the decision. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 583-583; 702 NW2d 539 (2005). Analysis of these factors supports the insurer's position.

The inquiry into workability is "essentially a question of whether the Court believes itself able to continue working within the framework established by a prior opinion." Michael Stokes Paulsen, 109 Yale L J at 1552. This consideration, when applied to the actual-prejudice requirement engrafted onto MCL 691.1404, supports a reversal. First, the reasoning in *Hobbs* and *Brown* cannot be reconciled with this Court's legislative or constitutional jurisprudence.

Thus, allowing *Hobbs* and *Brown* to stand will cause confusion amongst bench and bar. Second, allowing *Hobbs* and *Brown* to stand will deprive a legislative choice of its efficacy. When it enacted MCL 691.1404, the Legislature made a policy choice in favor of a bright-line rule, rather than a standard.

Bright-line rules offer obvious benefits because they avoid dispute about whether something is inside or the line, which is "bright" or clearly established. For example, if a legislative body establishes a speed limit of thirty-five miles per hour, it does so because it believes that this speed is normally appropriate. A legislative body could simply adopt a requirement that drivers proceed at a speed appropriate for conditions. Doing so, would allow drivers to go faster in daylight on smooth well-repaired roads in the country when there is little or no traffic and should require them to go slower in the dark, or near housing or schools. But it also means that drivers can challenge a ticket on the basis that the speed was appropriate for the conditions. Proofs with a standard are likely to be more difficult. Litigation costs multiply. The possibility of erroneous results increases. On the other hand, drivers are not forced to drive at a speed far slower than is necessary for safety. The legislature makes a policy choice when it selects a bright-line rule over a standard.[2]

The Michigan Legislature made such a choice when it enacted MCL 691.1404. It chose a readily-definable time limit within which the notice was to be supplied. Its purpose was to ensure that the government had notice before changes were made in a road, to allow for speedy correction of highway defects, and to facilitate settlement of appropriate cases without the need

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[2]The choice of a bright-line rule, which may be over- or under-inclusive, but is consistently applied, or a standard, which raises more difficult questions of proof and may be inconsistently applied, has been subject to debate. See e.g. Louis Kaplow, *Rules versus standards: An economic analysis*, 42 Duke L J 557, 557 (1992); Kathleen M. Sullivan, *The justices of rules and standards*, 106 Harv L R 22, 26 (1992); Antonin Scalia, *The rule of law as a law of rules*, 56 U Chi L R 1175, 1176 (1989). The choice is essentially one of policy with competing concerns favoring each.

for litigation. In *Hobbs* and *Brown*, the judiciary substituted a standard, the actual-prejudice requirement. This requirement creates difficult problems of proof for the government, undermines the government's ability to quickly correct highway defects of which it lacks knowledge, and interferes with the government's ability to settle appropriate cases without the need for litigation. Unless *Hobbs* and *Brown* are overruled, these problems will continue and the legislative balance struck in MCL 691.1404 will not be given effect. The judiciary cannot continue to work within the framework of *Hobbs* and *Brown* without interfering with legislative policy choices. Thus, this factor counsels overruling both decisions. It has been said that "[p]ublic policy is a very unruly horse, and when you once get astride it you never know where it will carry you." *Richardson v Mellish*, 2 Bing 252 (1824). Having gotten onto this horse years ago when it issued its decisions in *Hobbs* and *Brown*, now is the time for the Court to dismount and return to the legislatively-enacted test.

Plaintiffs can point to no reliance interests that would support a decision retaining the tolling exception. *Id.* This Court has recently taught, when considering the reliance interest, "it is to the words of the statute itself that a citizen first looks for guidance in directing his action." *Robinson*, 462 Mich at 468. A court should not "confound those legitimate citizen expectations by misreading or misconstruing a statute" because to do so will disrupt the reliance interest. If a past court has misread or misconstrued a statute, the "subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction." *Id.* Speaking for the Court, Justice Taylor explained that the court's distortion of the statute amounts to a "judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and absent a constitutional violation, the courts have no

legitimacy in overruling or nullifying the people's representatives." *Id.* Because of this, an error "can gain no higher pedigree as later courts repeat the error." *Id.*

There is no principled manner to ignore these over-arching principles of a text-based interpretation of MCL 500.3145(1). Justice Scalia explained that, where a statute "contains a phrase or sentence that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted...." *West Virginia University Hospitals, Inc v Casey*, 499 US 83; 111 S Ct 1138; 113 L Ed 2d 68 (1991). Having adopted a like view, this Court should not now ignore the Legislature's explicit requirement.

Finally, the need to preserve public impressions of judicial integrity supports a reversal. This Court has uniformly adopted and applied a text-based approach to statutory interpretation. See e.g. *Nawrocki*, *supra*, *Robinson*, *supra*, *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). It has done so consistent with its view that this approach constitutes the faithful application of well-defined legal principles—not the predisposition of individual judges. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000). Having repeatedly held that a court is "most justified in overruling an earlier case if the prior court misconstrued a statute," this Court should now faithfully apply that rule here. In doing so, a reversal is required.

This Court has rejected the legislative acquiescence rule that formerly supported the maintenance of erroneous prior judicial decisions. *Rogers v Detroit*, 457 Mich 125; 579 NW2d 840 (1998); and *Donajkowski v Alpena Power Co*, 460 Mich 243; 596 NW2d 574 (1999). That rejection makes sense and it also supports the insurer's position here. Treating an erroneous statutory interpretation as binding or affording it strong stare decisis weight might make sense if the legislature were perpetual. But it is not. Today's legislature may "leave in place an interpretation of a law simply because today's coalitions are different. The failure of a different

body to act hardly shows that the interpretation of what an earlier one did is 'right.'" Frank H Easterbrook, *Stability and reliability in judicial decisions*, 73 Cornell L R 422, 427 (1988). When a decision is founded upon plain error, refusing to follow it "cannot be fairly criticized as illegitimate." John Paul Stevens, *The life span of a judge-made rule*, 58 NYU L R 1, 4 (1983).

Jonathon Swift's satire of the doctrine of stare decisis, reminds us to carefully consider and correct error if there is a cogent reason for doing so:

> It is a maxim among ... lawyers, that whatever had been done before may legally be done again; and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind. These, under the name of precedents, they produce as authorities, to justify the most iniquitous opinions; and the judges never fail of directing accordingly.

Swift, *Gulliver's Travels* (Dodd Mead ed, 1950), p 256. But this Court correctly has refused to continue to decide cases in accord with plain error based on a disregard of the language of the statute; instead, it has embarked upon a course of action directed towards restoring deference to the text of statutes that it interprets.

As Justice Frankfurter said, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Boys Markets v Retail Clerks*, 398 US 235, 255; 90 S Ct 1583; 26 L Ed 2d 199 (1970), quoting *Henslee v Union Planters Bank*, 335 US 595, 600; 69 S Ct 290, 293; 93 L Ed 2d 259 (1949) (Frankfurter, J, dissenting). The *Hobbs* and *Brown* courts impinged upon the legislature's sphere of decisionmaking to create a broad new exception to a clear statutory provision. Stare decisis neither commands nor supports the continued adherence to these precedents.

ISSUE II

IF *HOBBS* AND *BROWN* ARE OVERRULED, THE DECISION SHOULD BE GIVEN RETROACTIVE EFFECT.

A. A JUDICIAL DECISION INTERPRETING A STATUTE APPLIES FROM THE EFFECTIVE DATE OF THE STATUTE.

At the outset, it is important to reiterate the general rule. Statutory decisions apply retroactively; that is, a judicial decision explaining the meaning of a statute applies from the effective date of the statute. That notion finds its roots in Blackstone who explains that the duty of the court is not to "pronounce new law, but to maintain and expound the old one," *Linkletter v Walker*, 381 US 618, 622-623; 85 S Ct 1731; 14 L Ed 2d 601 (1965) (quoting 1 W Blackstone, Commentaries *69). This is consistent with the principle that a judge's function is not to legislate but to explain the meaning of legislation enacted by a legislative body. Even when overruling prior precedent, the new decision is "an application of what is, and therefore had been, the true law," *Linkletter*, 381 US at 623 (citing Shulman, Retroactive Legislation, in 13 Encyclopedia of the Social Sciences 355, 356 [1934]). One state court justice explained the thinking behind the rule:

> I understand the doctrine to be in such cases, not that the law is changed, but that it was always the same as expounded by the legal decision, and that the former decision was not, and never had been the law, and is overruled for that very reason.

Gelpcke v City of Dubuque, 68 US (1 Wall) 175, 211 (1863) (Miller, J., dissenting).

Former Supreme Court Justice Harlan also spoke to the need for a court to adhere to the rule of retroactivity. He explained in one early decision that picking and choosing between similarly situated litigants those who alone will receive the benefit of a "new" rule of law offends against our basic judicial tradition. *Desist v United States*, 394 US 244, 256; 89 S Ct 1030; 22 L Ed 2d 248 (1969) (Harlan, J. dissent). In Harlan's view, matters of principle were at stake that

required the retroactive application of precedent. Harlan also deplored the doctrinal confusion that, to his view, stems from creating exceptions to the retroactive doctrine. 394 US at 258.

In more recent times, Justice Scalia and others have lambasted the judiciary for usurping legislative powers by toying with retroactivity. By way of example, Justice Scalia took the position that "prospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be." *American Trucking Ass'n v Smith*, 496 US 167, 200; 110 S Ct 2323; 110 L Ed 2d 145 (1990) (Scalia, J., concurring). According to Scalia, applying decisions prospectively "is contrary to that understanding of 'the judicial power' which is not only the common and traditional one, but which is the only one that can justify courts in denying force and effect to the unconstitutional enactments of duly elected legislatures, the very exercise of power asserted in [this case]." *Id.* at 201. See also Bradley Scott Shannon, *The retroactive and prospective application of judicial decisions*, 26 Harv J of Law & Public Policy 811 (2003).

The selective application of the ruling is also barred because it violates the principle of treating similarly situated persons the same. *Harper v Virginia Dep't of Taxation*, 509 US 86; 113 S Ct 2510; 125 L Ed 2d 74 (1993). In his concurring opinion in *Harper v Virginia Dep't of Taxation*, 509 US 86; 113 S Ct 2510; 125 L Ed 2d 74 (1993), Justice Scalia cautioned courts against the practice of tinkering with retroactivity as such behavior may well violate significant judicial norms:

> Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of stare decisis. It was formulated in the heyday of legal realism and promoted as a "techniqu[e] of judicial lawmaking" in general, and more specifically as a means of making it easer to overrule prior precedent.

509 US at 105, 113 S Ct at 2522. In addition, Justice Scalia warned that the "true traditional view is that prospective decisionmaking is quite incompatible with the judicial power, and that

courts have no authority to engage in the practice." *Id.*, citing *James B. Beam Distilling Co v Georgia*, 501 US 529, 534; 111 S Ct 2439, 2443; 115 L Ed 2d 481 (1991) and other cases.

These principles apply with equal strength under Michigan law. Each time the Court arrogates to itself the power to legislate, it harms the administration of justice. Decisions that tinker with full retroactivity of a statute, in essence, amount to the judicial rewriting of the statute's effective date. By establishing a new effective date, the Court encroaches upon the legislature's sphere of authority. Indeed, such a ruling may be seen as a violation of the separation of powers clause of the Michigan Constitution, which divides the powers of government into three branches and bars one branch from exercising powers properly belonging to the other. Const 1963, art 3, § 2. If prospective application of the law might conceivably be justified when addressing a change in the common law (an area within the judiciary's unique purview) or when dealing with vested property rights or when imposing a new duty or obligation, no such rationale applies here. Any decision limiting the retroactive effect of this decision amounts to a usurpation of legislative prerogative to establish the limitation date for bringing claims. Instead, full retroactivity should apply.

Not surprisingly in light of this backdrop, Michigan courts have traditionally given litigants who successfully obtain a reversal of prior precedent, always after much risky investment of time, energy, and expense, the benefit of the new rule. *Placek v Sterling Heights*, 405 Mich 638, 690-691; 275 NW2d 511 (1979) (Coleman, C.J. dissenting because the majority "seemingly automatically" considered the benefits of the decision "to be due the parties in the instant case."). This traditional retroactive application of judicial decisions in all civil cases on direct review stems from a proper understanding of the court's function, which is to decide litigated issues brought before them. Shannon at 838-839. A full retroactivity approach would

mean that the Court's holding would apply in any circumstance that it can be invoked under Michigan court rules.

This makes both practical and theoretical sense. According to commentators, "[p]rospective announcements of judge-made law raise both accuracy and legitimacy concerns." Shannon, at 849 quoting Michael C. Dorf, *Dicta and article III*, 142 U Pa L R 1997, 2000 (1994). Prospective decision making is difficult to predict, potentially denies the litigants of the benefit of a decision in their favor, and often leads to ambiguous results in practice because the determination of whether events occurred before or after the date of a precedent-setting opinion can be difficult to ascertain. And prospective decisionmaking tends to undermine public confidence in the judiciary because it injects uncertainty into the process, undermines the notion that courts say what the law is, and not what it should be, and allows for a highly subjective approach.

Despite the longstanding understanding of the judiciary's limited role, as noted above, Michigan courts (as well as other state courts) have created a limited exception. This Court has occasionally restricted the effect of certain decisions that overrule past precedent. But it has done so in limited circumstances involving the overruling of uncontradicted, settled precedent whose resolution was not clearly foreshadowed (assuming a weighing of the three factors outlined above also warrants deviating from the general rule of full retroactivity). See, e.g., *Tebo v Havlik*, 418 Mich App 350; 343 NW2d 181 (1984); *Sturak v Ozomaro*, 238 Mich App 549; 606 NW2d 411 (1999); *Lindsay v Harper Hospital*, 455 Mich 56; 564 NW2d 861 (1997). Whatever the merits of that approach in general, it is not suitable here.

B. THE STANDARD SET FORTH IN *POHUTSKI* SUPPORTS ADHERENCE TO THE NORMAL RULE OF FULL RETROACTIVITY.

We turn first to the threshold question of whether overruling *Hobbs* and *Brown's* judicially-created actual-prejudice requirement constitute "clearly establishing a new rule of

law." It must be observed that *Hobbs* and *Brown* represented usurpation of legislative action. This Court itself has flatly asserted that it has an obligation to correct such past abuses, an act which "restores legitimacy" to the system. *Robinson v Detroit,* 462 Mich 439, 472-473; 613 NW2d 307 (2000). It did so without limiting the effect of its decision in *Robinson*. This central factor controls all other aspects of the three-factor *Linkletter* test embraced by this Court in *Pohutski*. The test: (1) the purpose of the "new" rule is to conform Michigan jurisprudence to the mandates of the Michigan Legislature; (2) there can have been no proper or legitimate reliance on a judicially-created rule of law adopted in contravention of the clear and unambiguous statutory text; and (3) the effect of full retroactivity on the administration of justice will be to honor the commands and prohibitions of the Michigan legislation.

In *Pohutski*, this Court quoted *Robinson*'s teaching about retroactivity in the context of the prior misreading of a statute and explained:

> In considering the reliance interest, we consider "whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real- world dislocations." *Id.* at 466, 613 NW2d 307. Further, we must consider reliance in the context of erroneous statutory interpretation:
>
> [I]t is well to recall in discussing reliance, when dealing with an area of the law that is statutory, ... that it is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law: to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction. The reason for this is that the court in distorting the statute was engaged in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's representatives. Moreover, not only does such a compromising by a court of the citizen's ability to rely on a statute have no constitutional warrant, it can gain no higher pedigree as later courts repeat the error. [*Id.* at 467-468; 613 NW2d 307.]

> Thus, while too rapid a change in the law threatens judicial legitimacy, correcting past rulings that usurp legislative power restores legitimacy.
>
> *Id.* at 472-473 (CORRIGAN, J., concurring)
>
> Accordingly, we must shoulder our constitutional duty to act within our grant of authority and honor the intent of the Legislature as reflected in the plain and unambiguous language of the statute.

465 Mich at 694-694. More recently, this Court characterized the retroactivity aspect of *Pohutski* as an extreme measure warranted only because of exigent circumstances. *County of Wayne v Hathcock*, 471 Mich 445, 484, n 98; 684 NW2d 765 (2004). The *Hathcock* court cautioned that there "is a serious question as to whether it is constitutionally legitimate for this Court to render purely prospective opinions, as such rulings are, in essence, advisory opinions." *Hathcock, supra* at 484 n 98. *Pohutski* was sui generis since it involved a history in which the Court had allowed recovery for trespass-nuisance claims against local governments that extended back to the 1800s. At the same time, after the *Pohutski* litigation began, but before the Court issued its opinion, the Michigan Legislature had created a new statutory cause of action. Thus, giving its decision retroactive effect would have, in the Court's view, carved out a tiny group of litigants who alone could not recover, when everyone before and after had the right to bring their claim. Critical to the Court's analysis was its effort to be faithful to what it undoubtedly perceived as a legislative signal when a new statute creating a cause of action was given immediate effect while *Pohutski* was pending before the Court.

Whatever the merits of *Pohutski's* decision to limit its effectiveness to prospective-only, those considerations do not apply here. To the contrary, the legislatively-enacted protection for governmental agencies should be given full effect. Doing so will be consistent with this Court's philosophy of effectuating legislative pronouncements and enactments.

Giving retroactive effect to the statutory notice requirements is particularly appropriate here because it will not impose any new requirement on those suing governmental agencies.

Even under *Hobbs* and *Brown*, the injured party was obligated to give notice to the governmental agency within the same time period. Thus, the injured party could not rely on *Hobbs* and *Brown* to ignore the notice requirement. *Hobbs* and *Brown* merely alleviated the impact of the rule by imposing an actual prejudice requirement on to governmental agencies before the notice requirement was given effect. And the opposing parties, the governmental agencies being sued, have no reliance interest in an actual prejudice requirement that prevents them from obtaining the benefit of a statutory condition. Thus, there is no reliance justification for giving a decision prospective effect. This Court should overrule *Hobbs* and *Brown*, and following the normal rule, give its decision full retroactive effect.

RELIEF

WHEREFORE, Amicus Curiae the Michigan Municipal League, the Michigan Municipal League Liability & Property Pool, and the Michigan Townships Association, respectfully request this Court to reverse the lower courts, explicitly overrule *Hobbs* and *Brown*, and grant such other relief as it proper in law and equity.

Respectfully submitted,

PLUNKETT & COONEY, PC.

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DATED: July 14, 2006

STATE OF MICHIGAN

IN THE SUPREME COURT

JOANNE ROWLAND a/k/a
JOAN ROWLAND,

Plaintiff-Appellee,

-vs-

WASHTENAW COUNTY
ROAD COMMISSION,

Defendant-Appellant,
_____/

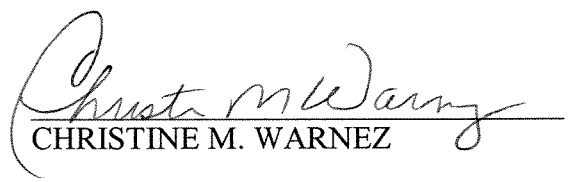
Supreme Court No. 130379

Court of Appeals No. 253210

Washtenaw County Circuit Court
No. 03-000128-NO

PROOF OF SERVICE

CHRISTINE M. WARNEZ, states that on July 13, 2006, a copy of the Amicus Curiae Brief of the Michigan Municipal League, the Michigan Municipal League Liability & Property Pool, and the Michigan Townships Association was served on JAMES McKENNA, Attorney for Plaintiff, 24825 Little Mack Avenue, St. Clair Shores, MI 48080-3218; ANDREW W. PRINE, Attorney for Defendant, P.O. Box 6340, Saginaw, MI 48608-6340; and MARCELYN A. STEPANSKI, Attorney for Amicus Michigan Municipal Risk Management Authority, 34405 West 12 Mile Road, Suite 200, Farmington Hills, MI 48331, by depositing same in the United States Mail with postage fully prepaid.



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